

MINUTES

MONTANA HOUSE OF REPRESENTATIVES 58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN JIM SHOCKLEY**, on February 14, 2003 at 8 A.M., in Room 137 Capitol.

ROLL CALL

Members Present:

Rep. Jim Shockley, Chairman (R)
Rep. Paul Clark, Vice Chairman (D)
Rep. Jeff Laszloffy, Vice Chairman (R)
Rep. George Everett (R)
Rep. Tom Facey (D)
Rep. Steven Gallus (D)
Rep. Gail Gutsche (D)
Rep. Christopher Harris (D)
Rep. Michael Lange (R)
Rep. Bruce Malcolm (R)
Rep. Brad Newman (D)
Rep. Mark Noennig (R)
Rep. John Parker (D)
Rep. Holly Raser (D)
Rep. Diane Rice (R)
Rep. Scott Sales (R)
Rep. Ron Stoker (R)
Rep. Bill Thomas (R)

Members Excused: None.

Members Absent: None.

Staff Present: John MacMaster, Legislative Branch
Lisa Swanson, Committee Secretary

Please Note. These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing & Date Posted: HB 457, 2/11/2003; HB 571,
2/11/2003
Executive Action: HB 457; HB 347; HB 346; HB 222

HEARING ON HB 457

Sponsor: REP. BOB LAWSON, HD 80, Whitefish

Opening Statement by Sponsor:

REP. LAWSON opened on HB 457. He stated that this bill relates to the offense of contractor theft. He explained that this is a growing problem in Montana's fastest growing cities. He explained that a person commits contractor theft if the person knowingly receives money from another person, to be used for buying materials, equipment, labor or other services, for a construction project and fails to use the money for that purpose.

EXHIBIT (juh33a01)

EXHIBIT (juh33a02)

EXHIBIT (juh33a03)

EXHIBIT (juh33a04)

EXHIBIT (juh33a05)

EXHIBIT (juh33a06)

{Tape: 1; Side: A; Approx. Time Counter: 1 - 26}

Proponents' Testimony:

Doug Adams, Whitefish, supported HB 457. He stated that this bill would address the problem of contractor theft and protect innocent Montanans. He stated that he hired a man to build some stairs for his new home. He signed a contract and made the agreed payments. He stated that the builder completed only half of the job and that he paid the builder \$43,000. He stressed that Montana is the only State without a Better Business Bureau and that he is working with the Secretary of State to change that. He stated that current laws do not adequately cover contract fraud.

EXHIBIT (juh33a07)

{Tape: 1; Side: A; Approx. Time Counter: 27 - 217}

Opponents' Testimony: None

Informational Testimony:

Cort Jensen, Consumer Protection Attorney, Department of Administration (DOA), supported HB 457. He stated that contractor fraud is the fastest growing fraud in Montana. He stressed that Bozeman, Whitefish, Kalispell, and Missoula are the

hardest hit with contractor fraud. He stated that there contractor fraud overlaps into the civil and criminal area.

{Tape: 1; Side: A; Approx. Time Counter: 217 - 261}

Questions from Committee Members and Responses:

REP. HARRIS asked whether he was amenable to amending other areas of the code. He suggested adding, under the current definition of theft, the phrase "or exerts." He stated that another suggestion would be to add a charge of felony theft under the Deceptive Business Practices statute. **Mr. Adams** responded that the issue is how to make it a criminal, and not a civil, matter.

REP. HARRIS asked about the contractor who built the stairway and at what point the deception occurred. **Mr. Adams** responded that the contractor was financially insolvent before he took the job and that, although it would be hard to prove, he felt the contractor intended to deceive him before he began the work.

REP. HARRIS asked whether he reviewed the Deceptive Business Practice statute with the county attorney. **Mr. Adams** stated he did not.

{Tape: 1; Side: A; Approx. Time Counter: 262 - 390}

REP. NEWMAN stated that the Deceptive Business Practice statute states that a person commits this offense when they either use, or possess, a false weight or measure to obtain the services; or they sell, offer, expose for sale or deliver, less than the representative quantity of a commodity; or they take or attempt to take more than the represented quantity of a commodity; or they sell or offer to sell adulterated commodities. With that said, he asked whether this statute could address contractor fraud. **Mr. Jensen** responded that the statute, as written, does not address contractor fraud. He stated that if a person has the intent to defraud another, at the outset, then you can apply the theft statute. He felt that if the intent to deceive occurred later, then you have a deceptive business act and not a theft. He explained that there are also charges which could be brought under the consumer protection statutes. He stated one of the questions he would ask, regarding charges, is whether this was a bad business act or an actual attempted theft.

{Tape: 1; Side: A; Approx. Time Counter: 462 - 470}

REP. FACEY asked about the money the contractor gets up front and when the money would be his to spend. **REP. NOENNIG** followed up with a question to Mr. Adams about whether the money he received was allocated for materials and labor. **Mr. Adams** responded that the money was not broken down. He stated that this bill would be

complaint driven. He also felt that requiring contractors to put the money into a trust until the job is completed, is not the bill's intent. **REP. NOENNIG** stated that even if the bill were passed, there would be a problem with prosecuting cases where the money was not identified as to how it should be spent.

{Tape: 1; Side: B; Approx. Time Counter: 1 - 60}

REP. NOENNIG stated that there can be a civil and criminal offense at the same time and one does not preclude the other. He asked Mr. Adams whether the prosecutor felt that theft would not cover the offense, or whether it would be difficult to prove.

REP. NOENNIG thought that if the contractor knowingly exerted control over Mr. Adams's money, with the purpose of depriving Mr. Adams, then that could be a theft. **Mr. Adams** responded that, as best he could recall, the prosecution could not prove criminal intent.

{Tape: 1; Side: B; Approx. Time Counter: 61 - 65}

REP. RICE asked Mr. Jensen about a situation involving a roof in which the roofer did not complete the job yet took the money. She posed whether the person who hires the contractor needs to take some responsibility with how things are set up regarding the payment of labor and materials. **Mr. Jensen** responded the law does not address the issue of owner responsibility but his office gives out brochures on how to set up an escrow account and other tips for consumers. He stated that most consumers trust contractors to do the job they are paid to do; that they are the experts.

{Tape: 1; Side: B; Approx. Time Counter: 66 - 99}

REP. HARRIS read from Title 45, Chapter 6, Section 318, MCA, which states, "purposely or knowingly delivers less than the represented quantities of any service." He followed up with a question as to why that statute would not cover the unfinished staircase. **Mr. Jensen** responded that he usually uses Title 30-14-142 to prosecute criminally, which would have a one year maximum prison sentence but that perhaps Title 45 could be used as well.

{Tape: 1; Side: B; Approx. Time Counter: 100 - 126}

Closing by Sponsor:

REP. LAWSON closed on HB 457 stating that he is willing to work with the Committee to make the bill better. He stated that this

bill would be a useful tool in the prosecution of contractor fraud cases and give consumers additional protection.

HEARING ON HB 571

Sponsor: REP. JOHN PARKER, HD 45, Great Falls

Opening Statement by Sponsor:

REP. PARKER opened on HB 571 stating that this bill would transfer the consumer protection attorney out of the Department of Administration (DOA) and into the Department of Justice (DOJ). He explained that the attorney is presently an orphan and the DOJ would be the best agency to have a consumer protection attorney. He believed this bill would benefit the Montana taxpayers.

{Tape: 1; Side: B; Approx. Time Counter: 127 - 195}

Proponents' Testimony:

Allie Bovingdon, Assistant Attorney General, DOJ, supported HB 571. She stated that the DOJ has a relationship with the county attorneys and local law enforcement. She explained that if the consumer protection attorney transferred to the DOJ, it would receive better training and legal support. She stated that support is contingent on the transfer of full-time-equivalents (FTE's) and the program resources which are currently budgeted to the DOA for the Office of Consumer Protection.

Opponents' Testimony: None

Informational Testimony:

Cort Jensen, Consumer Protection Attorney, DOA. He stated that his office gets about 7,000 calls a year, and that he has five investigators: two in telecommunications, two in general, and one in automobile cases. He stated that if they moved to the DOJ, he would need to move all five investigators as well. He stated that they do not have the budget for an 800 number but they help a lot of Montanans. He stated that he is available to answer any questions.

{Tape: 1; Side: B; Approx. Time Counter: 196 - 335}

Questions from Committee Members and Responses:

REP. NOENNIG asked about the Federal Trade Commission Rules defining unfair or deceptive acts. He asked whether the current statute is too broad. Mr. Jensen responded that Montana's

definition was taken from the federal definition and that it is current. **REP. STOKER** commented on whether the DOA was having to give up the \$385,000 budget for the Consumer Protection unit. He asked about where the \$500,000 in fines goes. **Mr. Jensen** stated that it all goes into the general fund. **REP. HARRIS** posed that Section 2, Page 2 of the bill concerning negligence per se could muddy the waters and have unintended consequences.

Closing by Sponsor:

REP. PARKER closed on HB 571. He stated that many are concerned about where the consumer protection attorney will be housed. He stated that it is a taxpayer issue; that taxpayers would be better served to house the attorney with the DOJ.

{Tape: 2; Side: A; Approx. Time Counter: 1 - 24}

EXECUTIVE ACTION ON HB 457

Motion: **REP. GALLUS** moved that HB 457 DO PASS.

Discussion:

REP. FACEY stated agreed there is a problem but that this bill may not address it. **REP. NOENNIG** had a problem with the bill. He stated contractor theft is already against the law and covered under the theft and deceptive business practice statutes. **REP. HARRIS** stated that he agreed with **REP. NOENNIG**. He felt that the problem with charging under deceptive business practices is that it would be a misdemeanor and it should be made a felony. **REP. NEWMAN** felt that the language in the bill needed to be modified and that we do not need another "designer" crime just to deal with contractors. **CHAIRMAN SHOCKLEY** stated that his analysis of the theft statute solves the contractor fraud problem. He stated that if the Committee wanted to make it clear, the theft statute could be modified to add "fails to return." **REP. PARKER** stated that if the criminal intent is not there, you cannot prosecute. He stated that this area of the law is very complex and there are times when contracts fail and it is without a criminal intent. **REP. SALES** commented that he has been his own contractor and been taken advantage of. He stated that this area of the law is difficult to prove and that it is a "buyer beware" environment.

Motion/Vote: **REP. NEWMAN** moved that HB 457 BE TABLED. Motion carried 10-7, by roll call vote, with **REPS. EVERETT, HARRIS, MALCOLM, PARKER, RASER, STOKER,** and **THOMAS** voting no.

{Tape: 2; Side: A; Approx. Time Counter: 25 - 449}

EXECUTIVE ACTION ON HB 222

Motion: REP. GALLUS moved that HB 222 DO PASS.

Motion: REP. PARKER moved that HB 222 BE AMENDED.

Discussion:

John McMaster stated that the bill required that parolees and probationers to pay a supervisor fee to the Department of Corrections (DOC). He explained that the Parker amendments would have them pay the fee to the clerk of the district court. **REP. PARKER** stated that the amendment would strike everything up to Section 3 of the bill, and Sections 5, 6 and 10 should be segregated.

EXHIBIT (juh33a08)

Vote: Motion that HB 222 BE AMENDED carried unanimously, by voice vote. (Strike everything up to Section 3.)

Motion: REP. RICE moved that HB 222 DO PASS AS AMENDED.

Discussion:

The Committee discussed suspending a person's sentence after boot camp. **Diana Koch** stated that a person has to petition the court to see whether they have to finish the remainder of their sentence.

Substitute Motion: REP. PARKER made a substitute motion that HB 222 BE AMENDED. (Section 10 amendment.)

Discussion:

REP. PARKER explained that amending the bill to include Section 10 would allow the court the discretion to keep an eye on an offender and to determine their needs. **REP. MALCOLM** asked whether a person out of boot camp would be on probation. **REP. PARKER** stated that he would, and if the person committed an offense, the judge could decide whether to revoke, or suspend the sentence. **REP. GALLUS** stated his support for the amendment due to the discretion it gives to the judge. **REP. NEWMAN** felt that this was a good amendment.

Vote: Motion that HB 222 BE AMENDED carried unanimously, by voice vote. (Section 10 of the bill.)

Substitute Motion: REP. GUTSCHE made a substitute motion that HB 222 BE AMENDED. (Section 6 of the bill.)

Discussion:

The Committee discussed the difference between detaining and arresting a person on probation or parole. REPS. SALES and NEWMAN discussed the probation and parole officers' safety and REP. NEWMAN explained that this amendment would allow the probation and parole officers to temporarily detain. CHAIRMAN SHOCKLEY asked whether probation and parole officers carry guns, and if this bill passed, would they need additional training. Mr. Ferriter, DOC, stated that probation and parole officers do carry guns and they would need additional training at the Academy if this bill passed.

Vote: Substitute motion that HB 222 BE AMENDED carried 15-2, by voice vote, with REPS. CLARK and SHOCKLEY voting no.

Motion/Vote: REP. RICE moved that HB 222 DO PASS AS AMENDED. Motion carried 17-0 by voice vote.

{Tape: 2; Side: B; Approx. Time Counter: 1 - 363}

EXECUTIVE ACTION ON HB 346

Motion: REP. FACEY moved that HB 346 BE POSTPONED.

Discussion:

CHAIRMAN SHOCKLEY commented that REP. FRANK SMITH felt this bill didn't fit in with the other DUI bills and that they need to coordinate the DUI bills in the Senate. REP. MALCOLM commented on Page 1, Line 18, which stated, "the department shall immediately issue and mail to the person a copy of an order impounding the license plates of all motor vehicles owned or co-owned by the person at the time of the receipt of the report or record." He asked whether this would wrongly punish the wives and children of the offenders. REP. NOENNIG stated that there was some discussion in the subcommittee about the federal requirements and the fact that this bill goes beyond what is federally mandated.

Vote: Motion HB 346 Be Postponed failed 5-12, by roll call vote, with REPS. FACEY, HARRIS, PARKER, STOKER, and THOMAS voting aye.

{Tape: 2; Side: A; Approx. Time Counter: 1 - 196}

Motion/Vote: REP. GUTSCHE moved that HB 346 BE TABLED. Motion carried 16-0 by voice vote.

EXECUTIVE ACTION ON HB 347

Motion/Vote: REP. NOENNIG moved that HB 347 DO PASS. Motion failed 4-14, by voice vote, with REPS. FACEY, GALLUS, HARRIS, and SHOCKLEY voting aye.

Discussion:

The Committee discussed the problems regarding the element of proof; in a landlord-tenant situation, this would not work. Some Committee members felt that if a landlord felt threatened by a tenant, the landlord should make a report to the authorities, the matter should be investigated, and possibly prosecuted. REP. NOENNIG felt that this bill attempts to blend the civil and criminal laws.

Motion/Vote: REP. GALLUS moved that HB 347 BE TABLED. Motion carried 17-1 by voice vote, with REP. FACEY voting no.

ADJOURNMENT

Adjournment: 12 P.M.

REP. JIM SHOCKLEY, Chairman

LISA SWANSON, Secretary

JS/LS

EXHIBIT (juh33aad)